BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GEORGE W. ROSS, JR.	)	
Claimant	)	
VS.	)	
	)	Docket No. 219,801
CROFT METALS	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the October 19, 2000 Award entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on March 21, 2001.

APPEARANCES

James E. Martin of Overland Park, Kansas, appeared for claimant. Tracy M. Vetter of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a March 22, 1995 automobile accident and alleged injuries to claimant's low back and lower extremities. Mistakenly believing that after back surgery claimant returned to work for respondent only to later voluntarily terminate his employment, in the October 19, 2000 Award the Judge determined that claimant should not receive a work disability (a disability greater than the functional impairment rating). Therefore, the Judge awarded claimant a 29 percent permanent partial general disability based upon Dr. Truett L. Swaim's whole body functional impairment rating.

Claimant contends Judge Foerschler erred. Claimant argues that (1) respondent replaced and terminated him in June 1997; (2) he then obtained another sales job in November 1997, which he lost due to his injuries from the March 1995 accident; (3) Dr. David J. Clymer operated on his back in January 1999 and that following surgery he has obtained another sales job where he is limited to working 1,000 hours per year and is paid $11 per hour ($211.54 per week average); and (4) he has a 67 percent task loss and a 69.7 percent wage loss, which creates a 68.35 percent work disability.

Conversely, respondent and its insurance carrier argue that (1) claimant voluntarily terminated his employment with respondent despite respondent's attempts to accommodate his restrictions and despite respondent's offer to transfer him to Arkansas to build a new sales territory; (2) claimant failed to make a good faith effort to obtain full-time employment, which would pay claimant 90 percent of his pre-injury earnings; (3) in the event claimant is awarded a work disability, his wage loss should be no more than 31.2 percent as the Board should impute a full-time post-injury wage based upon claimant's employment with Kirsch Fabrics; (4) claimant's task loss should be no greater than 47 percent as the task list prepared by the vocational rehabilitation expert, Michael Dreiling, should be increased from 12 to 17 total tasks of which claimant can perform nine, creating a 39.1 percent work disability; and (5) in the event claimant's permanent partial general disability is limited to the functional impairment rating, claimant should receive benefits for only that portion of the 20 percent impairment rating given by Dr. Clymer that is found to be related to the March 1995 accident.

The only issue before the Board on this appeal is the nature and extent of claimant's injuries and disability.

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. Claimant began working for respondent in 1992. Respondent manufactures doors and windows. The parties stipulated that on March 22, 1995, claimant sustained personal injury by accident arising out of and in the course of employment when he was involved in an automobile accident and thrown forward into the steering wheel.

2. At the time of the accident, claimant was a district manager and his duties included making sales to retailers, making and tending displays, handling defective items, answering customer complaints, and determining whether installation problems were due to manufacturing defects or some other problem. The job required extensive travel and lifting up to 100 pounds.

3. When the accident occurred, claimant did not realize that he had been injured. But within the week, claimant began to experience intense back pain. Respondent and its

insurance carrier referred claimant for treatment, which ultimately resulted in back surgery in January 1999 by orthopedic surgeon Dr. David J. Clymer.

4. Following the accident, claimant continued working for respondent until sometime in June 1997. During that period, claimant was receiving conservative medical care but his back pain and the symptoms in his legs progressively worsened, causing problems driving and lifting. Up to the time of claimant's termination, respondent had accommodated claimant's injuries by providing coworkers and temporary employees to help claimant. But in June 1997, respondent hired an "independent rep company" to replace claimant and take over his territory. At that time, respondent offered to move claimant to Arkansas to rebuild a territory but he declined as he felt he could not physically do the job because of the back pain associated with the travel and lifting. Claimant testified, as follows:

> A. (Claimant) Well, they [respondent] were to the point that they had hired an independent rep company to take my territory over but they offered me to move to Little Rock to rebuild a territory and I couldn't physically do the job. I knew that. The pain was that great. The traveling I couldn't do and the lifting was just impossible.
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> Q. (Mr. Martin) So they replaced you with somebody else, an independent rep company?
>
> A. Yes, sir. [1]

The Board finds that claimant was physically unable to continue to perform his job as one of respondent's district managers because of the injuries sustained in the March 1995 accident and he was, therefore, replaced. The record does not indicate the actual date in June 1997 that claimant last worked for respondent.

5. Claimant began looking for another job and on approximately November 1, 1997, started working for Kirsch Fabrics as a territory salesman. Claimant's symptoms continued to progress and in August 1998 claimant saw Dr. David J. Clymer, who recommended back surgery. Claimant did not immediately undergo surgery and on approximately November 1, 1998, he was terminated by Kirsch Fabrics as it was agreed that he could not satisfactorily perform his job.

6. On January 26, 1999, Dr. Clymer operated on claimant's back. Unfortunately, the surgery did not resolve all of claimant's symptoms.

> Q. (Mr. Martin) Okay. Now, tell the Judge, since the surgery has your condition improved, stayed the same, gotten worse?

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[1] Regular Hearing, July 11, 2000; p. 22.

> A. (Claimant) Well, since the surgery I'm sorry to say I can probably do less than I could prior. I wished I could say different but it didn't occur. I still have a tremendous amount of pain in the lower back, especially when I try squatting, bending, or lifting, anything like that.
>
> I've had to curtail all working out with the exception of walking and that's what I did even when I was under Dr. Clymer's care. I can drive a car. If we're on a trip I can go about 50 miles before I have to stop and get out and walk.
>
> I've stopped doing most anything that I used to do. I told Dr. Clymer that he did the best that he could but he said sometimes they work, sometimes they don't. So now it's just pain. . . .[2]

7. With Dr. Clymer's permission, claimant began looking for another job in June 1999. After searching for approximately 11 months, claimant found a part-time job with Bill Louis and Company and began working for that employer on May 3, 2000. In that position, claimant earns $11 per hour but he is limited to working 1,000 hours per year (which averages approximately 20 hours per week). The job provides no fringe benefits. During the July 2000 regular hearing, claimant introduced 17 pages of records that listed 117 contacts made to potential employers from June 3, 1999, through April 10, 2000, during his job search. At the regular hearing, claimant also testified that he was still employed in his part-time job.

8. According to claimant, his present job is physically easier to perform than his former district manager's position with respondent. The displays and products he now handles are smaller and lighter. Claimant testified, in part:

> A. (Claimant) Well, the physical demands of this job [Bill Louis and Company] compared with, say, Croft [respondent] are not even close. I mean, we do have to set some displays but most of them are small displays with the exception of one. Most of them are small products. I don't have to sell. I just take care of the bins. To me this is a service job, not a sales job. So you just sort of service the store with those products.[3]
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> . . .
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> Q. (Mr. Martin) If you were to categorize Croft's job, the physical demands of that job, would that be light or heavy?

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[2] Regular Hearing, July 11, 2000, pp. 26, 27.

[3] Regular Hearing, July 11, 2000; p. 36.

> A. Croft would be very physically heavy. Croft is a very demanding physical job.[4]

9. Claimant earned approximately $28,500 per year working for respondent, plus he received some fringe benefits such as medical, dental, and disability insurance, plus a profit-sharing plan. The parties stipulated that claimant's pre-injury average weekly wage, for purposes of this Award, was $698. When claimant worked for Kirsch Fabrics, he earned approximately $25,000 per year, plus he received some insurance benefits. The value of those fringe benefits is not in the record. At oral argument before the Board, claimant argued that he had sustained a wage loss of 12 percent while working for Kirsch Fabrics, which is the difference between the wages that claimant earned working for respondent and working for Kirsch Fabrics, excluding the fringe benefit packages.

10. Respondent and its insurance carrier presented Dr. Clymer's testimony in this claim. The doctor, who is a board certified orthopedic surgeon, testified that he first saw claimant in August 1998 for a second opinion regarding the back injury that claimant had sustained in March 1995. The doctor found claimant had an L5 spondylolysis and some disk prominence. After additional radiographic studies, Dr. Clymer believed claimant had a herniated disk at the L4-L5 level toward the right side that was causing right leg pain. The doctor felt the L5 spondylolysis problem was probably a preexisting condition that may have been aggravated by the accident. Because the L4-L5 disk was consistent with claimant's symptoms, the doctor recommended surgical decompression and diskectomy, which was eventually performed on January 26, 1999. During surgery, the doctor also operated on the next lower level to address the L5 spondylolysis.

11. According to Dr. Clymer, the surgery improved claimant's right leg discomfort. But claimant continued to complain of low back pain, which the doctor believed was related to the herniated disk and the spondylolysis. The doctor last saw claimant on September 29, 1999, and released him from treatment with restrictions against lifting over 25 pounds along with restrictions against excessive bending or twisting. Although the doctor first rated claimant as having a 12 percent whole body functional impairment, on cross-examination the doctor agreed that the rating would be in the neighborhood of 20 percent when using the revised third edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) and considering and including the spondylolysis, the two levels of surgery, and the loss of range of motion.

12. Dr. Clymer was not asked to provide an opinion of claimant's task loss percentage. But the doctor did testify that claimant should not perform any job tasks that exceeded his permanent work restrictions.

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[4] Regular Hearing, July 11, 2000; p. 37.

13. Claimant presented the testimony of Dr. Truett L. Swaim, who is also a board certified orthopedic surgeon. Dr. Swaim examined claimant in December 1999 and diagnosed claimant as being status post-lumbar laminectomy at the L4-L5 and L5-S1 levels with a diskectomy at L4-L5 level and a foraminectomy on the right side at the L5-S1 level for treatment of a herniated disk at the L4-L5 level and a disk protrusion with foraminal stenosis at the L5-S1 level. Using the revised third edition of the AMA *Guides*, the doctor determined that claimant had a 29 percent whole body functional impairment. The doctor also determined that claimant retained the ability to do light work and to occasionally lift up to 20 pounds and frequently lift up to 10 pounds, but the doctor felt that claimant should be restricted from repetitive bending, stooping, and lifting, as well as prolonged sitting and standing.

14. Dr. Swaim reviewed the task list prepared by vocational rehabilitation expert Michael Dreiling. Out of the 12 essential tasks identified, the doctor identified eight that claimant could no longer do.

15. The Board affirms the Judge's finding that claimant has a 29 percent whole body functional impairment as a result of the March 22, 1995 accident. The Board is more persuaded with Dr. Swaim's analysis of claimant's impairment as claimant's attorney established during the cross-examination of Dr. Clymer that Dr. Clymer had only partially followed the AMA *Guides.* Additionally, Dr. Swaim, after herniating a cervical disk and becoming disabled from performing surgery, testified that he has obtained additional education and certification in evaluating injuries.

16. Claimant hired vocational rehabilitation expert Michael Dreiling to compile a list of the job tasks that claimant performed during the 15-year period before the date of accident. Mr. Dreiling analyzed claimant's 15-year work history and identified 12 job tasks. When asked on cross-examination if four additional items – negotiating contracts, educating customers, building customer bases, and forming personal relationships with customers – should be considered as separate job tasks, Mr. Dreiling described those items as attributes and skills of a salesperson rather than as separate job tasks. In addressing whether the task list should be expanded to include the four items noted above, Mr. Dreiling testified, in part:

> Well, I wouldn't break these out as what I considered to be the essential tasks. Are they responsibilities and attributes and characteristics that the employer expects their salespeople have, certainly, and we could list hundreds of those that go along with being a salesperson, but the bottom line is what are the overall tasks that they have to accomplish to keep their job.[5]

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[5] Deposition of Michael Dreiling, August 1, 2000; pp. 16, 17.

Mr. Dreiling also indicated that some, if not all, of those four attributes and skills are included in the 12 tasks that he identified.

17. At the regular hearing, the parties agreed that claimant had been paid temporary total disability benefits for the period from January 26, 1999, through August 30, 1999. Claimant's attorney announced there was no other claim for temporary total disability benefits being made.[6]

18. Following the March 22, 1995 accident, claimant's average weekly wage has varied. Based upon the entire record, the Board finds that claimant's post-injury wages, and corresponding wage losses, for the following designated periods are as follows:

> From the date of accident on March 22, 1995, through June 30, 1997, the approximate date that claimant was terminated from respondent's employment, claimant remained employed with respondent and, therefore, the Board finds that claimant was earning a wage comparable to that which he was earning on the date of accident. Therefore, for this period there is no wage loss.
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> From July 1, 1997, to November 1, 1997, the approximate date that claimant began working for Kirsch Fabrics, claimant was unemployed and, therefore, had no wages. Therefore, the wage loss for this period is 100 percent.
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> From November 1, 1997, to November 1, 1998, the approximate date that claimant was terminated from his employment with Kirsch Fabrics, claimant earned $25,000 per year, plus he received fringe benefits. The Board finds that claimant has established a 12 percent wage loss for this period, which claimant's attorney argued at oral argument before the Board.
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> From November 1, 1998, to January 26, 1999, claimant was unemployed and was earning no wages. Therefore, claimant's wage loss during this period is 100 percent.
>
> (From January 26, 1999, through August 30, 1999, the parties stipulated that claimant was entitled to receive temporary total disability benefits as he was recovering from back surgery.)
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> From August 31, 1999, to May 3, 2000, claimant was unemployed and, therefore, was earning no wages. Therefore, claimant's wage loss is 100 percent for this period.

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[6] Regular Hearing, July 11, 2000; p. 5.

> From May 3, 2000, through the July 11, 2000 regular hearing, claimant was employed part-time by Bill Louis and Company and was earning approximately $220 per week ($11 per hour x the approximate 20 hours per week). Therefore, commencing May 3, 2000, claimant's wage loss is approximately 68 percent.

CONCLUSIONS OF LAW

1. The Award should be modified to award claimant benefits for a work disability.

2. The Board finds and concludes that claimant was terminated by respondent after being replaced by an independent company. The Board concludes that claimant was unable to continue working for respondent because of the injuries sustained in the March 22, 1995 work-related accident.

3. Because claimant's back injury is an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 44-510e (Furse 1993). That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[7] and *Copeland*.[8] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against a work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job that the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of

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[7] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[8] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

the wage loss prong of K.S.A. 44-510e (Furse 1993), that workers' post-injury wages should be based upon their ability to earn rather than their actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injuries.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[9]

4. The Board finds and concludes that the greater weight of the evidence establishes that as of the July 11, 2000 regular hearing claimant had made a good faith effort to find appropriate employment. After an 11-month search, claimant was able to obtain a part-time job. Because claimant has exercised good faith, the actual difference in his pre- and post-injury wages should be used in the permanent partial general disability formula.

5. Based upon Dr. Swaim's testimony and Mr. Dreiling's testimony, the Board finds and concludes that claimant has lost the ability to do eight of 12, or approximately 67 percent, of the tasks that he performed in the 15-year period before the March 1995 accident.

6. Claimant has the following permanent partial general disability percentages for the following periods:

> For the period from March 22, 1995, through June 30, 1997, claimant was earning a comparable wage and, therefore, claimant's permanent partial general disability is limited to the 29 percent whole body functional impairment rating.
>
> For the period from July 1, 1997, to November 1, 1997, claimant has a 100 percent wage loss and a 67 percent task loss, which creates an 84 percent work disability.
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> For the period from November 1, 1997, to November 1, 1998, claimant has a 12 percent wage loss and a 67 percent task loss, which creates a 40 percent work disability.
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> For the period from November 1, 1998, to January 26, 1999, claimant has a 100 percent wage loss and a 67 percent task loss, which creates an 84 percent work disability.
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> For the period from January 26, 1999, through August 30, 1999, claimant was recovering from surgery and received temporary total disability benefits.

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[9] *Copeland*, p. 320.

For the period from August 31, 1999, to May 3, 2000, claimant has a 100 percent wage loss and a 67 percent task loss, which creates an 84 percent work disability.

For the period commencing May 3, 2000, claimant has a 68 percent wage loss and a 67 percent task loss, which creates a 68 percent work disability.

AWARD

WHEREFORE, the Board modifies the Award and grants claimant the following permanent partial general disability benefits:

George W. Ross, Jr., is granted compensation from Croft Metals and its insurance carrier for a March 22, 1995 accident and resulting disability. Based upon an average weekly wage of $698, Mr. Ross is entitled to receive the following benefits.

For the period from March 22, 1995, through June 30, 1997, 118.71 weeks of benefits are due at $319 per week, or $37,868.49, for a 29 percent permanent partial general disability.

For the period from July 1, 1997, through October 31, 1997, 17.57 weeks of benefits are due at $319 per week, or $5,604.83, for an 84 percent permanent partial general disability.

For the period from November 1, 1997, through October 31, 1998, 29.72 weeks of benefits are due at $319 per week, or $9,480.68, for a 40 percent permanent partial general disability.

For the period from November 1, 1998, through January 25, 1999, 12.29 weeks of benefits are due at $319 per week, or $3,920.51, for an 84 percent permanent partial general disability.

For the period from January 26, 1999, through August 30, 1999, 31 weeks of temporary total disability benefits are due at $319 per week, or $9,889.

For the period from August 31, 1999, through May 2, 2000, 35.14 weeks of benefits are due at $319 per week, or $11,209.66, for an 84 percent permanent partial general disability.

For the period commencing May 3, 2000, 57.89 weeks of benefits are due at $319 per week, or $18,466.91, for a 68 percent permanent partial general disability and a total award of $96,440.08.

As of March 30, 2001, there is due and owing to the claimant 31 weeks of temporary total disability compensation at $319 per week in the sum of $9,889, plus 260.86 weeks of permanent partial general disability compensation at $319 per week in the sum of $83,214.34, for a total due and owing of $93,103.34, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $3,336.74 shall be paid at $319 per week until further order of the Director.

The Board adopts the orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Overland Park, KS
Tracy M. Vetter, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director